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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 667

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,**

Appellant,

vs.

**PUBLIC UTILITIES COMMISSION OF THE STATE
OF CALIFORNIA AND CITY OF LOS ANGELES**

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant¹ submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of California entered in this cause.

¹ Appellant will sometimes hereafter be referred to as the Santa Fe, the Public Utilities Commission of California as the Commission, and the City of Los Angeles as the City.

Opinions Below

The Supreme Court of California wrote no opinion. The original opinion and order of the Public Utilities Commission of California in this cause are reported at 49 Cal. P. U. C. 147 and a copy is attached hereto as Appendix A. The opinion and order of the Public Utilities Commission on rehearing are reported at 51 Cal. P. U. C. 771 and a copy is attached hereto as Appendix B.

Jurisdiction

The judgment of the Supreme Court of California in this cause was entered on December 11, 1952. A petition for appeal was presented to the Chief Justice of said Court on March 6, 1953. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2).

The state action of which review is sought in this Court is an order of the Public Utilities Commission of California authorizing the City of Los Angeles to widen and increase the height of certain highway underpasses over which appellant's tracks are laid and directing appellant to pay 50% of the costs of the new construction. This Court has held that: "Such an order, being legislative in nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction." *Lake Erie & W. R. R. Co. v. Public Utilities Commission*, 249 U. S. 422, 424 (1919); *Live Oak Water Users' Association v. Railroad Commission of California*, 269 U. S. 354, 356 (1926); *Hamilton v. Regents*, 293 U. S. 245, 258 (1934).

Manner in Which the Federal Questions Were Raised

In its Petition for Writ of Review in the Supreme Court of California, the highest court of the state and the only

state court having jurisdiction to review orders of the Commission, appellant contended specifically and in detail that the Commission's order violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.² The federal constitutional principles which must be observed in the allocation of costs in grade-separation cases had been presented to the Public Utilities Commission, as stated in its opinions, and were also raised in appellant's petition for further rehearing before the Commission.

The Supreme Court of California denied appellant's Petition for Writ of Review without opinion, two judges dissenting. Its order constituted a judgment on the merits upholding the Commission's order against a claim of invalidity based upon the federal Constitution. *Napa Valley Electric Company v. Railroad Commission of California*, 251 U. S. 366, 372-3 (1920).

Statute Involved

The statute involved, as that term has been defined by this Court, is the Order on Rehearing of the Public Utilities Commission of California entered in this cause on June 24, 1952 and identified as Decision No. 47344 (Appendix B, *infra*).

Statement

Appellant, the Atchison, Topeka and Santa Fe Railway Company is a common carrier by railroad, operating trains in interstate commerce in the western half of the United States. For many years the Santa Fe and its predecessors have maintained railroad lines into the City of Los Angeles, California over private rights of way acquired for that pur-

² Appellant's contention that the Commission's order is invalid as in conflict with the provisions of the federal Constitution was set out in detail in Part V of its Petition for Writ of Review, pp. 4-10.

pose. Two sets of tracks now cross a street known as Washington Boulevard on two railroad bridges constructed in 1914. Costs of construction of the viaducts, each of which provided street openings 20 feet wide, were borne equally by the City and the Santa Fe. In 1926 the business of the railroad required the laying of an additional track, and the Santa Fe, at its own expense, made the necessary changes in the super-structure over the street.

In 1931 the City constructed a bridge across the Los Angeles River just east of the underpasses and opened Washington Boulevard as an arterial highway extending east from the Pacific Ocean to points several miles beyond the eastern limits of Los Angeles. An immediate increase in the volume of vehicular traffic resulted in an application by the City for authority to enlarge the underpasses and an order by the Commission in 1932 authorizing the construction of two 56-foot structures to replace the existing 20-foot underpasses, 75% of the cost to be borne by the City and 25% by the Santa Fe. This order was never acted on by the City.

By 1948 the volume of traffic on Washington Boulevard had increased tremendously. The street had now been connected up with important cross-country highways then existing or in the process of construction. It had also been widened to 60 feet throughout most of its length and had become one of the City's principal arteries of truck and commercial traffic; in fact, one-fourth of the vehicles now using the streets are trucks. The center of gravity for truck traffic in the entire City of Los Angeles had shifted to a point on this highway less than a mile west of the underpasses. In short, the striking changes in the volume and character of highway vehicles in this area since 1914 are such that it has become necessary to expedite the flow of that traffic by the construction of six lane underpasses, al-

though the present viaducts are still perfectly adapted to carrying the railroad tracks, which have remained unchanged since 1926.

Accordingly, in 1948³ the City applied to the Commission for authority to construct the two new underpasses here involved, each 90 feet wide and providing 15 feet vertical clearance. After receiving evidence and considering briefs, the Commission authorized the construction applied for, finding that "the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic." By its order the Commission directed that the City should bear all expenses involved in the building of the new roadway and underpasses, with the exception of the sum of \$95,160, which was allocated to the Santa Fe (Appendix A, *infra*).

Both the City and the Santa Fe filed petitions for rehearing of the Commission's order allocating costs of construction, which were granted, and a further hearing was held. Again there was no dispute about the fact that, as the Commission had previously found, the new construction was necessitated wholly "by the increase in vehicular and pedestrian traffic." The Santa Fe therefore reiterated its contention that, under principles recognized by the Commission itself for many years and enunciated by this Court in a very similar case, "so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."³

The Commission rejected this contention (Appendix B, *infra*). It ruled that the allocation of the costs of constructing rail-highway grade separations is an exercise of the state's police power and need not, therefore, have any relation to the benefits which the railroad will receive from

³ *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405, 430 (1935).

The solution, where this condition became particularly acute, was to require the construction of grade separations.

Though the need for a grade separation might be plain, the question of who was to pay the cost remained: the railroad with a virtual monopoly in transportation and fast and frequent trains, or the community, on behalf of users of the small, slow and infrequent highway vehicles then in service? As Mr. Justice Brandeis summed up the matter in his opinion for the Court in the *Nashville* case, *supra*:

"Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship." 294 U. S. at p. 423.

Accordingly, when the question was first presented to this Court whether a railroad could be ordered, consistently with the Constitution, to construct a grade separation at its own expense, the answer was that it could; that since most of the highway vehicles then in use operated merely as feeders of passengers and freight to the railroads and were thus an incident of the railroads' own growth, a state's power to provide for the safety of its citizens was sufficient to overcome the railroad's claim that its property was being taken without Due Process of Law. See, *e. g.*, *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430 (1914); *Missouri Pacific R. Co. v. Omaha*, 235 U. S. 121 (1914); *Erie Railroad Co. v. Board of Public Utility Comrs.*, 254 U. S. 394 (1920). It is these cases upon which appellees principally rely.

2. The Nashville Case

By 1935, however, it had already become manifest to this Court that a "transportation revolution" had taken place.

Motor vehicle registration had increased from 55 thousand in 1904 to 26 million in 1935. In the same period, highway mileage had increased from 153 thousand to approximately 3 million and, in contrast, railroad mileage, after rising to a peak of 254 thousand in 1916, had declined to 241 thousand in 1935.

It was in the light of this marked change in the factors inducing grade separations that this Court considered *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405 (1935). The case involved the constitutionality of a Tennessee statute providing that in every case of construction of a grade separation the railroad must pay one-half of the total cost. A railroad ordered to pay 50% of the cost of an overpass challenged the order and the statute upon which it was based, claiming that the factors which, in the past, had been held to justify the imposition of such burdens on the railroads had undergone material changes. The Supreme Court of Tennessee refused to consider the evidence proffered to that effect, but this Court reversed.

The careful and detailed opinion of Mr. Justice Brandeis characterized the recent developments in the relation between rail and highway transportation as "the revolutionary change incident to transportation wrought in recent years by the widespread introduction of motor vehicles."⁸

⁸ Only two years later, and shortly after it was given regulatory power over the transportation of property by motor carriers the Interstate Commerce Commission reported to the Congress as follows:

"Whether it realizes it or not, the country has in fact experienced a transportation revolution in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day." 52 Annual Report of ICC (1938), p. 17.

Earlier the Commission had said:

"Competition of the bus and truck is a development of recent years, but it is the most formidable which confronts the railroads." 45 Annual Report (1931), p. 98.

On the basis of this fundamental development he noted two conclusions: (1) Grade separations are no longer constructed primarily for reasons of safety, for the railroad has ceased to be the main cause of accidents; they are now essentially economic improvements designed to further the "uninterrupted, rapid movement by motor vehicles," and are comparable to widening the highway, removing curves, shortening distances, etc. (2) the competitive position of the railroads as against trucks, busses and other users of the highways has changed radically in recent years. The opinion points out:

"Separation of grades serves to intensify the motor competition and to further deplete rail traffic." 294 U. S. at p. 423.

Thus, to require the railroad to bear an arbitrary apportionment of the cost of a grade separation which exceeds the benefit it receives is to make it subsidize its powerful and growing competitors.

In view of this complete inversion of positions and purposes, this Court held that an arbitrary assessment against a railroad of 50% of the cost of a grade separation could not be sustained. The constitutional standard of allocation of costs was stated clearly and unequivocally:

*** • • • when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. [citations] While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; [citations] so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them

[citations]." 294 U. S. at pp. 429-430 (Emphasis supplied.)

Nothing that this or any other court has said since impinges to the slightest degree upon this principle. On the contrary, the experience of each succeeding year has verified its wisdom.

3. *The Commission's Action*

The action of the California Commission in rejecting the Santa Fe's contention that the allocation of costs of the Washington Boulevard grade separation is "constitutional only if based on benefits received by them" is strange and inexplicable. It is strange because it represents a departure by the Commission from a "benefit" standard, which it recognized and applied for 16 years, and a return to its former practice of making an arbitrary 50% allocation to the railroad regardless of the benefit the railroad receives from the separation.¹ The order is inexplicable because the circumstances which caused it to adopt the "benefit" standard in the early 1930's have become more compelling with every passing year. Moreover, its about-face is contrary to recent recommendations and action by experts and legislative bodies throughout the country.

In 1932, in a decision approving the widening of the very underpasses which are here again involved, the Commission allocated 25% of the cost to the Santa Fe and 75% to the

¹ Since the allocation to the Santa Fe of 50% of the costs of constructing the grade separation by the Commission in the instant case was admittedly based upon no particular standard, the Commission's order is identical in substance and effect with the 50% allocation provision of the Tennessee statute involved in the *Nashville* case. Shortly after its decision in this case, the Commission ordered the Southern Pacific Company to pay 50% of the cost of constructing a new \$1,493,200 grade separation just outside the City of Los Angeles—again without relation to any benefits which that company will receive therefrom. That order is now before the Supreme Court of California on the Southern Pacific's Petition for Writ of Review.

City. In making that allocation on the basis of the then existing facts, the Commission recognized the principles adopted by this Court three years later in the *Nashville* case, as follows:

"There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost." *Application of the City of Los Angeles*, 37 C.R.C. 784, 787 (1932).

And the following year the Commission further anticipated this Court's decision in the *Nashville* case by allocating costs of grade separations primarily upon the basis of actual benefit to the railroad. *Application of the Department of Public Works*, 38 C.R.C. 380 (1933). In language strikingly like that of this Court, the Commission said:

"In allocating the costs here we are departing from the practice which has obtained generally heretofore, of assessing one-half to each the public and the railroad in case of an existing grade crossing. While this procedure has appeared equitable in the past, the tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest. The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the rail line. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic.

"After carefully considering all the evidence in these proceedings, it is concluded that the order should authorize the grade separation, as proposed, and fix the amount to be contributed by the railroad in a lump sum

based upon direct and indirect benefits * * * 38
C. R. C. at p. 386. (Emphasis supplied.)

Allocation of costs upon the basis of benefits to the railroad, as required by the *Nashville* case, remained the rule in California until decision of the case here on appeal. For 16 years the Commission allocated grade separation costs to the railroads on the basis of benefits received without experiencing any difficulty. Now, however, the Commission has returned to the practice of earlier days, holding "that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory." (Appendix B, *infra*.)

A most extraordinary feature of the Commission's abrupt return to the practice which it had followed prior to 1932, is the fact that the asserted reason therefor is that "the great increase in population and the tremendous increase in motor vehicle traffic present *a new problem*." (Appendix B, *infra*.) The Commission is thus saying that the very conditions which led that body, in 1932 and 1933, and this Court in 1935, to abjure the imposition of an arbitrary assessment of grade separation costs upon the railroads, although magnified many times in the interim, now lead the Commission back to its precise point of departure twenty years ago. In other words, the marked progression of the very changes which posed *a new problem* in the early 1930's and required the Commission, as it declared, to make a rational and equitable distribution of the cost of grade separations on the basis of relative benefits, is now said to present *a new problem* which warrants a reversion to arbitrary action.

(a) *The Present Position of the Railroads*

A tremendous intensification of highway traffic has worked the transformation of the highways from the role of railroad feeders into a vast, independent system of trans-

portation, competitive with the railroads and promising to dwarf them. The trends noted by Mr. Justice Brandeis in the *Nashville* case have continued and accelerated in the years since that case was decided. It is beyond question that the "revolutionary change" noted by the Court and the Interstate Commerce Commission^a has become progressively more extreme, as the following comparisons illustrate.

From 1904 to 1949, highway mileage increased from 153,662 to 3,326,000. In contrast, railroad mileage reached a peak of 254,000 in 1916 and, by 1949, had declined to 225,000.

The number of registered motor vehicles in the United States increased from 55 thousand in 1904 to a little over 26 million in 1935 and to more than 44 million in 1949. In contrast to that phenomenal multiplication of motor vehicles, railroad equipment in service has shown a declining trend. Passenger cars in service decreased some 27 per cent from 1916 to 1949, locomotives in service declined 34 per cent during the same period while freight cars in service showed a decrease of 22 per cent. The physical facilities of these competing industries mark the continuing growth of motor vehicle transportation and the relative decline in the position of the railroads.

The increase in the proportion of all commercial traffic handled by motor vehicles has also been spectacular. In 1925, the railroads hauled 77.4 per cent of the commercial intercity freight traffic while the trucks hauled 2.1 per cent. *Pacific Intermountain Express Co.—Control and Purchase*, 37 M. C. C. 341,365. By 1940, the change noted in the *Nashville* case had become unmistakable. Railroad participation in total freight traffic had decreased to 62.3 per cent but the trucks had quadrupled their proportion to 8.4 per cent of the total. In 1950, the relevant figures showed

^a See footnote 6, *supra*.

a further decrease in the railroads' share of freight traffic to a low point of 58.7 per cent, while the trucks hauled 12.4 per cent of the total intercity freight traffic. 65th Annual Report of I. C. C., p. 20. This represented another increase of approximately 50 per cent for the motor vehicle competitors of the railroads.

The shift of short-haul, local business to the trucks has been even more extreme. For example, in 1949, the steam railroads handled only 20.9% of California intra-state business; the highway carriers hauled 73.7%. What has happened in the field of passenger traffic is equally striking. The railroad percentage of the passenger traffic business, excluding that moving by private automobile, declined from 75.7 per cent in 1926 to 62.1 per cent in 1936 and 50.5 per cent in 1950. Report of Special Committee of National Association of Railroad and Utilities Commissioners dated November 11, 1952, p. 66. During this same period of time, the proportion hauled by the busses increased from 9.3 per cent of the total in 1926 to 29 per cent in 1936 and 33.8 per cent in 1950. But the "revolution" has been most drastic in the shift of the railroad passenger business to the private automobile. In 1936, automobiles accounted for over 197 billion *intercity* passenger miles, while in 1950 the total for automobiles was over 337 billion, which represents 84.34 per cent of the total intercity passenger miles for that year. (*Ibid.*) It is thus plain that the change which the Court emphasized in the *Nashville* case has persisted and gained momentum in the years since.

In the *Nashville* case this Court also stressed the fact that in the days before motor vehicles became commercially important:

" * * * the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth

tion arising under the Constitution of the United States. They are also important, however, because they represent and epitomize a phenomenon that is presently being experienced in every state of the union. That phenomenon is the growth of truck, bus and automobile traffic upon the highways and the consequent agitation for elimination of more and more grade crossings and for enlargement of existing grade separation solely for the purpose of speeding up and thus reducing the cost of the highway traffic.

We can submit no better description of the forces at work than that contained in the Commission's original opinion in this case (Appendix A, *infra*):

"The area in the vicinity of the two underpasses here under consideration has become one of the leading industrial areas of Los Angeles and its environs. As a result, there is a large amount of motor truck traffic hauling to and from these areas. The reasons advanced by applicant [the City] for widening the underpasses, which reasons were not disputed by protestant [the Santa Fe], were the increase in motor vehicle traffic, both passenger and commercial, the need to make Washington Boulevard a through street for its entire length, the need for a bus line to transport passengers through that area, and the inadequate height of the present underpass."

It is thus apparent, and quite beyond dispute, that the sole reason for the new construction is to speed the flow and hence lower the cost of vehicular traffic, a large proportion of which is in direct competition with the railroad.

In the State of California alone there was a total of 13,130 grade crossings in 1949. In addition, there were 809 grade separations. The economic pressures that have operated to make six lane underpasses desirable along Washington Boulevard are operating at countless other locations in California and outside California. The poten-

tial cost of eliminating all grade crossings in California has been estimated by the Commission itself at approximately two and one-half billion dollars! The consequences of the Commission's return to the rigid pattern of an arbitrary 50% allocation of costs to the railroads are thus of momentous importance.

Conclusion

The present appeal is a test case. The ultimate issue necessarily presented is whether this Court's decision in the *Nashville* case is to be qualified or overruled, for it is submitted that the Commission's order is in direct conflict with this Court's opinion and judgment. We respectfully suggest that the Court's appellate jurisdiction has been properly invoked, that the federal questions involved are substantial in merit and that the importance of the issues warrants this Court's consideration of the appeal upon full briefs and argument.

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the constitution of the separation.* Since it concluded that, under the police power, its authority to thrust upon the railroad the full burden of the cost of the underpasses is unbridled by any countervailing constitutional limitations, it did not attempt or pretend to justify on any factual or logical basis the assessment of less than the full cost. In short, the 50% cost allocation to the Santa Fe is acknowledged to be wholly arbitrary in that it does not purport to represent a reasoned judgment based upon "benefits received" or, indeed, to reflect any particular standard of allocation of costs. The record before the Commission showed the benefit to the Santa Fe to be far less than the assessment against it. The Commission does not and can not deny this. On the ground that it was exercising police power it refused to measure the benefits to the railroad or to allocate the costs of the improvement on that basis.

Upon denial by the Commission of appellant's petition for further rehearing, the Santa Fe filed a Petition for Writ of Review in the California Supreme Court, supported by a detailed Memorandum of Points and Authorities. That court denied the petition, two judges dissenting, after which an appeal was taken to this Court within the time fixed by statute.

The Questions Presented Are Substantial

A vast and mounting volume of highway traffic is crossing and crisscrossing railroad rights-of-way everywhere in a pattern of growing complexity. As a result, the circumstances of this case are not unique. The issues here presented are now being contested in a great number of pro-

*The Commission stated in passing (Appendix B, *infra*): "we observe that this proposed improvement is not without benefits to the railroad," but it made no pretense of assessing the value of such benefits and specifically rejected the benefit standard for the allocation of costs adopted by this Court in the *Nashville* case.

ceedings pending before state courts and commissions, and many more are in the process of incubation. Moreover, the question of the proper legal standards for allocation of grade separation costs poses a basic constitutional problem of accommodation between users of the highway and the railroads at points of their intersection. Finally, the Commission's order directly and flagrantly violates the constitutional principles which this Court, speaking through Mr. Justice Brandeis, held applicable in making the necessary accommodation of interests at the points of intersection of rail and highway traffic. *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405 (1935). The scope of the problem will be sketched briefly to indicate the substantiality of the questions presented.⁵

1. *The Background of the Problem*

It has often been remarked that America lives on wheels. The difficulties created by this mobility are manifold and not the least of these problems is that of accommodating the needs of railroad and highway traffic at points where they intersect.

Early in our country's history the slow speeds and meager travel upon both railroads and highways made rail-highway grade crossings of relatively little danger or inconvenience. During the latter part of the 19th Century and the early part of the 20th Century, however, railroad mileage grew by leaps and bounds, and railroads far outstripped highway conveyances as carriers of passengers and freight. Railroad trains became relatively frequent and swift, with the result that grade crossings became increasingly dangerous.

⁵ The authority of the Commission to order construction of the grade separations here involved, the desirability of speeding an increasing flow of highway traffic through the underpasses, and the accuracy of the cost estimates are not here in issue.

was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad." 294 U. S. at p. 423.

While there has been a very significant growth of the community here involved in recent years,^{*} that growth reflects and is reflected by the great increase in *highway* traffic. During the same period, on the other hand, railroad facilities have remained relatively static.

There is no possible justification, therefore, for the Commission's refusal to follow the principles enunciated in the *Nashville* case. On the contrary, the changes in the competitive picture since that time fortify the reasoning of this Court and compel adherence to the path marked by its decision in that case.

(b) *Recent Informed Approach to the Problem*

If continuing research and informed public opinion had cast doubt on the principles set out in the *Nashville* case, the Commission might have attempted to justify its action on the ground that reconsideration of the "relative benefit principle" is essential. The fact is, however, that critical appraisals of the grade separation problem have clearly and unanimously approved this Court's recognition of the fundamental change in the relationship between railroad and highway traffic and its effect upon allocation of the costs.

^{*} Census figures show that from 1930 to 1940, the population of the State of California increased by about 52 per cent, and from 1940 to 1950 the increase was 53.3 per cent. For Los Angeles County, the population growth from 1930 to 1950 was approximately 100 per cent.

The most recent and complete study of the problem is a monograph published by the Stanford Research Institute.¹⁰ Much that is there said is relevant to the problems here presented and is commended to the Court's attention. The Institute's approach may be indicated by this paragraph (at pp. 45-46):

"The need for grade crossing improvements and eliminations arises only because of the demands of the various beneficiary groups for transportation service. In order to justify such improvements from an economic standpoint, it is necessary to take into account the demands of the various groups for the improvements. Sufficiently accurate measurements of the various demands can be determined by measuring the benefits each group at interest will derive from the improvements. The relative dollar values of these economic benefits must be the basis for distribution of the costs to each group."

The institute dismisses the policy adopted by the Commission in this case of assigning costs to the railroad on the basis of an arbitrary percentage of total costs as:

"* * * no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings" (p. 47).

Other evidence of informed thinking on the subject is provided by the fact that Congress and a number of state legislatures have, since the *Nashville* case was decided, enacted statutes providing for allocation of grade separation costs to the railroads on a benefit basis, generally with a maximum assessment upon the railroads of from 10 to

¹⁰ *The Railway-Highway Grade Crossing Problem* (The Stanford University Press, 1952.) Copies of this monograph are being furnished to the Clerk of this Court for its judicial notice.

25 per cent." An Indiana Highway Commission official states that:

"This legislation can be considered an indication of the trend of popular thought on this subject. Previous laws in Indiana required the railroads to bear one-half the cost of such installations." Milner, *Danger or Delay*, 35 National Safety News (May, 1937) 11, 12.

It can hardly be denied, therefore, that in reverting to an arbitrary 50—50 allocation basis, the Commission has disregarded not only the governing declarations of this Court on the subject but the informed judgment of experts and the "trend of popular thought on this subject."

In addition, and particularly in view of the magnitude of the problem presented, the principles applied below plainly constitute an undue and ever increasing burden on interstate commerce contrary to the Commerce Clause of the Constitution and the National Transportation Policy, enacted by Congress to implement that Clause.¹¹

In *King v. United States*, 344 U. S. 254, 262 (1952), this Court expressly recognized as a pressing problem in implementing the National Transportation Policy as to the railroads,

"the growth of vigorous competition from automobiles and other forms of transportation which made it futile

¹¹ Federal: Federal Aid Highway Act of 1944, 58 Stat. 838 (10%); Indiana (20%); Maryland (25%); Michigan (15%); New Jersey (15%); New Mexico (10%); New York (15%); Ohio (15%); West Virginia (10%).

¹² "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" 54 Stat. 899 (1940).

to compensate for the passenger deficit by increasing passenger rates.

The same competitive problem has also been emphasized by the Interstate Commerce Commission in connection with the diversion, particularly in recent years, of freight traffic from railroads to trucks and other carriers. *Ex Parte 168*, 276 ICC 9, 46 (1949). This increasing competition, together with rising costs, has held the railroads to "substandard" rates of return in spite of a series of post-war rate increases. *Ex Parte 175*, 284 ICC 589, 612 (1952). These conditions have caused a Congressional Committee to express concern as to the "precarious financial position" of the railroads. Sub-Committee of the Senate Committee on Interstate and Foreign Commerce, Sen. Rep. No. 1039, 82d Cong., 1st Sess. 46 (1951).

The imposition of grade separation costs upon the railroads at once increases their operating costs and reduces those of highway carriers, thus improving the already strong competitive position of the latter. The Commission's new policy, if not reviewed by this Court, will thus impose expenses upon the railroads which simply can not be met, thereby accentuating the difficulty of preserving an adequate national transportation system.¹²

4. *The Importance of This Appeal*

The facts of this case are, of course, important in that they constitute the framework upon which is woven a ques-

¹² Under the rigid formula now being applied by the Commission, the railroad is not only required to pay one-half the cost of the improvement, without regard to any benefits received, but as a large taxpayer of the city and state must participate substantially also in bearing the other half of the cost. This double burden is given emphasis by the facts recited by this Court in the Nashville case, that nearly 28% of the railroad's gross revenues is required annually to pay state and local taxes plus cost of maintaining its roadway, whereas commercial motor carriers moving on public roads pay not more than 7% of their gross revenues in state and local taxes (294 U.S. at pp. 427-8).

APPENDIX "A"

Decision No. 43374

BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA

Application No. 29396

In the Matter of the Application of THE CITY OF LOS ANGELES,
a municipal corporation

OPINION

The petition of the City of Los Angeles, applicant herein, concerns the proposed widening and increasing of the vertical clearance of two grade separation crossings of Washington Boulevard and the Harbor Branch line¹⁴ and the main line¹⁵ railroads of The Atchison, Topeka and Santa Fe Railway Company. The petition alleges that the present grade separations are inadequate to meet the present demands of vehicular traffic in that they are too narrow and the vertical clearances are too low. Applicant requests that this Commission issue its order authorizing and requiring the proposed improvements, and also designating the work

¹⁴ This crossing is designated as Crossing No. 2H-0.1-B, and legal description is as follows:

That portion of the right of way, 66 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page 106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

¹⁵ This crossing is designated as Crossing No. 2-143.2-B, and the legal description is as follows:

That portion of the right of way, 100 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Judgment of Condemnation had in Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide at Harriett Street.

to be done and the costs to be apportioned to each of the parties hereto.

Protestant, The Atchison, Topeka and Santa Fe Railway Company, in its answer to the above-mentioned petition, denies, upon information and belief, any need for changing the existing grade separation crossings, and further alleges that the present crossings are wholly sufficient for the needs of the railroad and the convenience and necessity of the public using the railroad facilities. Respondent contends that, since it will receive no benefit from the proposed changes, and since any alleged need for these changes has been occasioned, not by the railroad activities, but by automotive traffic using the highway, it should not be required to bear any of the costs of changes that might be made.

Public hearing was held in Los Angeles, California, on December 6, 1948, before Examiner Syphers, at which time evidence was adduced and the matter submitted, the parties being granted permission to file written briefs. Applicant has filed opening and closing briefs, and protestant has filed a reply brief. The matter is now ready for decision.

Washington Boulevard is a public street extending from the westerly boundary of the city at the Pacific Ocean, in the Venice area, easterly through the entire breadth of the city and for a distance of several miles east of the easterly boundary of the city.¹⁶ In the vicinity of the grade separation crossings here under consideration, Washington Boulevard traverses one of the principal industrial districts of the Los Angeles area. Throughout most of its length, Washington Boulevard has a paved surface at least 60 feet in width, with some exceptions where the pavement width varies from 40 to 60 feet. However, at the site of the two crossings hereunder consideration, the pavement narrows down to 20 feet in width while the street easement at these points is 90 feet. The vertical clearance of these grade separations is between 13 and 14 feet.

Witnesses for applicant testified as to the need for enlarging these two grade separation crossings. Due to the

¹⁶ Exhibit 8 is a map of Washington Boulevard.

rapid increase in population in Los Angeles City and also in the county, the automobile traffic has greatly increased. This has caused a congested condition at the site of the two crossings in question inasmuch as the underpasses are too narrow and too low to permit a free flow of traffic. It is very difficult for trucks to pass each other in the underpasses, and some of the larger vehicles cannot safely go under the underpasses because of their height. All of these factors, in addition to causing congestion at the site of the underpasses, also cause a diversion of traffic. Vehicles turn to other streets, and studies¹⁷ made by the principal traffic engineer of the City of Los Angeles show heavy turning movements at intersections in the vicinity of the underpasses. These heavy turning movements create safety hazards at the intersections where they are made.

Exhibits 3 to 7 inclusive are photographs of the two underpasses and corroborate the description of the conditions there existing as given by various witnesses.

Some of applicant's witnesses testified that there was a need for public bus transportation along Washington Boulevard in the vicinity of the underpasses but that the inadequacy of these underpasses has deterred the institution of such bus service. Other testimony was to the effect that it is becoming increasingly important to have through highways in Los Angeles. Washington Boulevard, for the greater part of its length, is a through highway and the widening of the underpasses in question would make it a through highway for its entire length. Furthermore, Washington Boulevard is one of the streets which has a bridge crossing the Los Angeles River.

The two grade separation crossings here under consideration were constructed in 1914 pursuant to an agreement between the City of Los Angeles and The Atchison, Topeka and Santa Fe Railway Company. The costs were borne one-half by the city and one-half by the railroad. In 1926 an additional superstructure for another track was installed and the entire cost of this was paid for by the railroad.

¹⁷ Exhibit 2 shows the results of a traffic check made by the City of Los Angeles as to the hourly volume of vehicles and the right and left turns at intersections in the vicinity of the two underpasses

Three proposals are advanced by the applicant. One is to fill in the present separation and have the crossings at grade. The second is to use the present grade separations for east-bound traffic and build a new west-bound roadway at grade. The third is to widen and increase the height of the existing underpasses and maintain the grade separation. The last of these proposals is the one most strongly advocated. Also, the testimony shows that a grade separation is the most desirable type of crossing for this situation, in that the volume of traffic is too heavy to satisfactorily and safely be handled over a grade crossing.

The total cost of widening the present underpasses and constructing new bridges is estimated to be \$722,100,¹⁸ and exhibits were introduced at the hearing showing the details of this contemplated improvement.¹⁹ A breakdown of the estimated costs was given by an engineer who testified for applicant, as follows:

Two span-deck girder railway bridges,

One west of Harriet Street	\$192,000	
One east of Harriet Street	204,000	\$396,000

Structure wing walls, and walls between structures	79,800
Storm drain, sewer	240,550
Slope rights	5,750

Total	\$722,100
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An analysis of all of the evidence presented herein shows that there is practically no dispute as to the factual situation. The testimony and exhibits showing the desirability and need of widening the existing underpasses and providing more vertical clearance were not seriously challenged nor controverted. Likewise, the estimated cost of the proposed improvements was not challenged. The issue in the matter, therefore, resolves itself into a legal inquiry. What portion of the costs, if any, shall be borne by the railroad?

¹⁸ Exhibit 12.

¹⁹ Exhibits 9, 10, 11, and 13.

In considering this question we have had the benefit of applicant's opening and closing briefs and protestant's reply brief.

The City of Los Angeles contends that the railroad should bear that portion of the costs which the existence of the railroad tracks add to the cost of the proposed improvement. Under this contention it is argued that the City of Los Angeles should pay only that cost of widening the street which it would pay if there were no railroad crossing; all other costs, such as the cost of the bridge and its supports, should be borne by the railroad. The public, it is contended, should not be required to pay additional costs for street improvements when these additional costs are occasioned by the presence of the railroad.

The protestant railroad takes the position that costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed widening since it is now operating satisfactorily and the widening of the street will in no way change these operations. As a matter of fact, the railroad contends the proposed improvements will actually be a detriment since there will be increased costs involved in maintaining the longer bridge. It contends that the need for widening the underpasses has arisen, not because of any activity of the railroad, but because of the increase in motor vehicle and pedestrian traffic.

In 1932 these same parties were before this Commission in a similar proceeding involving the same two crossings.²⁰ At that time the proposal of the City of Los Angeles was to widen the two grade separations so that the roadway under them would have a width of 56 feet. This commission issued its order authorizing widening of the grade separations and holding that the costs should be borne "25 per cent by The Atchison, Topeka and Santa Fe Railway Company and 75 per cent by applicant". The order further provided that the authorization therein granted should lapse and become void if not exercised within one year from

²⁰ Decision No. 25069, dated 8/15/32, in Application No. 18063, 37 CRC 784.

the date thereof. The authorization was not exercised and, therefore, lapsed according to its terms.

As pointed out by applicant in its closing brief, we cannot now fail to take note of the material change in conditions at the present time as compared to those in 1932, at the time of Decision No. 25069, *supra*. The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.

According to the evidence presented, the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic. The area in the vicinity of the two underpasses here under consideration has become one of the leading industrial areas of Los Angeles and its environs. As a result, there is a large amount of motor truck traffic hauling to and from these areas. The reasons advanced by applicant for widening the underpasses, which reasons were not disputed by protestant, were the increase in motor vehicle traffic, both passenger and commercial, the need to make Washington Boulevard a through street for its entire length, the need for a bus line to transport passengers through that area, and the inadequate height of the present underpass. It was pointed out that the height of the underpass should be increased so as to provide adequate clearance for commercial vehicles. All of these factors have resulted in a congestion of traffic in the area of the underpasses, and the diversion of traffic to other streets, which diversion is felt even in the central business district of Los Angeles.

The protestant railway company contends that none of these factors are due to the operation of the railroad; that the railway operations are being conducted satisfactorily over the present underpasses. A fair view of all of the evidence presented in this matter supports this contention. Thus we are specifically faced with the problem of who shall pay the cost of widening of the underpass where the necessity for such widening is not due to the activities of the railroad but rather to the needs of the automotive and pedestrian traffic.

The applicant city relies rather strongly on the proposition that the proposed improvement is an exercise of the

police power and that, therefore, it is distinguishable from similar situations involving federal aid highways. Exhibit No. 20, introduced in evidence, is a copy of General Administrative Memorandum 325 of the Public Roads Administration, Federal Works Agency, of the United States Government. This particular memorandum sets out the policy of the federal agency to be that the costs assessed against the railroad in such situations shall be based upon the benefits accruing to the railroad and, in no case, shall costs be greater than 10% of the total cost of the project. In the case of reconstruction of existing rail-highway grade separation structures, the memorandum states that such reconstruction "shall be considered as not resulting in ascertainable benefits to the railroad and, consequently, no contribution to the cost of such a project by the railroad shall be required."

We find that the situation presented in the matter before us is differentiable from those grade crossing and grade separation situations involving federal aid highways, since Washington Boulevard is a city street and no federal funds are to be used in the proposed widening.

Applicant city, in its brief, set out at some length the authority of this Commission to require grade separations and allocate the costs thereof. These contentions are not challenged and there is no question as to the jurisdiction and power of this Commission in this matter to allocate costs within legal and constitutional limitations. However, in considering these costs, a sound policy requires that the allocations be reasonable and equitable. We must take cognizance of present-day conditions, and in this particular instance we are impressed not only by the fact that the need for the proposed improvements is not brought about by any requirement of the railroad, but also by the fact that, but for the existence of the railroad at the location of the proposed street widening and the grade separation structures now there, the city would be able to widen its street without the necessity of incurring the cost of replacing the existing bridge and underpass structures with the new structures proposed.

If the contentions of the City of Los Angeles were to be

sustained, then the railroad would be required to pay \$475,800, that amount being the cost of the two proposed bridges and the structure wing walls and walls between the structures. The City of Los Angeles would be required to pay \$246,300, that being the cost of the proposed improvements other than that cost necessitated by the existence of the railroad. We do not subscribe to this contention. Within its proper limitations, the police power of the City of Los Angeles is not challenged. However, we must also consider the fact that protestant railway has already paid its proportionate share of the existing structures.

The pavement under the existing underpasses is 20 feet in width and the proposal is to widen this so as to permit a 90-foot roadway thereunder, but, an analysis of other evidence presented in this record shows that the widening of these underpasses to 90 feet will not increase the traffic capacity of the street to that extent. The Washington Boulevard bridge over the Los Angeles River is only 56 feet in width and is located east of the underpasses and west of Soto Street, with no cross streets between the underpasses and this bridge. Accordingly, it is obvious that the practical carrying capacity of the street beyond the underpasses would be limited to 56 feet.

In view of this situation, and in view of the evidence which indicates that the principal need for widening the underpasses is occasioned by traffic conditions on Washington Boulevard, we conclude that the proposed additional width of the underpasser, over and above 56 feet, becomes a matter of future city planning and will not contribute to the immediate traffic problem.

The Commission in *City of Los Angeles Application No. 18063*, Decision No. 25069, 37 CRC, 784 at 786-7 said: "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. It

should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable adequate crossing over its tracks both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease."

We believe that the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated. Therefore, in considering any allocation of costs, the extent of the additional cost for bridge structures for the widening of the street over and above a 56-foot width should be allocated to the city.

As previously has been pointed out, the total cost of the proposed improvement will be \$722,100, but the cost attributable to the presence of the railroad is \$475,800. The remainder of the cost is clearly attributable to the paving and widening of the street. Of the proposed 90 feet of roadway, 20 feet is now available under the existing underpasses and the excess over 56 feet, or 34 feet, is attributable to future city planning. Therefore, this leaves but 36 feet of the proposed railway bridges, the costs of which are in any way attributable to the existence of the railway. These costs would amount to 40% of \$475,800, or \$190,320.

We conclude that this last-named amount is the only cost which should be allocated in this proceeding. In allocating this amount of \$190,320 between the applicant city and the protestant railroad, we give effect to the factual situation as presented by the evidence in this case. A fair view of this evidence warrants the conclusion that each of the parties should defray one-half of this amount.

After considering all the evidence presented in this matter we hereby find that public convenience and necessity have been shown to justify the widening of the existing grade separations, and we further find that there is a duty upon the protestant railway to defray a portion of the costs of such widening, as set out hereinabove.

ORDER

Application as above entitled having been filed, a public hearing having been held and the Commission being fully advised in the premises,

It is ordered that the City of Los Angeles be, and it hereby is, authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka and Santa Fe Railway Company in the manner and at the locations more particularly described in the foregoing opinion, and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. The expense of constructing said undergrade crossings shall be borne by the City of Los Angeles with the exception of the sum of \$95,160, which amount shall be borne by The Atchison, Topeka and Santa Fe Railway Company.

2. In the event applicant elects to construct said undergrade crossings, the cost of maintaining those portions of the separations which, for the purpose of this decision, shall be referred to as the superstructures, which shall be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka and Santa Fe Railway Company. The remainder of the maintenance of said structures shall be borne by applicant.

3. Prior to the commencement of construction, applicant shall file with this Commission for approval a set of plans for the proposed grade separation crossings which plans shall have been approved by The Atchison, Topeka and Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve such plans. In the event the said railway company refuses to approve such plans, this Commission may issue supplementary orders in this matter.

4. The crossing shall be constructed with clearances conforming to the provisions of General Order 26D of this Commission.

5. Applicant within thirty (30) days thereafter shall notify this Commission, in writing, of the completion of the installation of said crossings and of its compliance with the conditions hereof.

6. The authorization herein granted shall lapse and become void if not exercised within one year after the date hereof unless further time is granted by subsequent order.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 4th day of October, 1949.

R. E. MITTELSTAEDT,
JUSTUS F. CHAEKKE,
IRA H. POWELL,
HAROLD P. HULA,
KENNETH POTTER,
Commissioners.

APPENDIX B

Decision No. 47344

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of The City of Los Angeles, a Municipal Corporation

Application No. 29396

OPINION ON REHEARING

By decision No. 43374, dated October 4, 1949, on Application No. 29396, the City of Los Angeles was authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in the manner therein prescribed and subject to certain specified conditions. The decision further provided that the expense of constructing the undergrade crossings was to be borne by the City of Los Angeles with the exception of the sum of \$95,160, which amount was to be borne by The Atchison, Topeka & Santa Fe Railway

Company. Subsequently, the effective date of this order was extended sixty days.

Under date of November 22, 1949, the City of Los Angeles filed a petition for rehearing alleging that the decision was contrary to the law and the facts in that it assumed the City to be the principal beneficiary and disregarded the City's right to require the railroad to remove the tracks, that the proposed widening and increasing of the height of the underpasses are necessary in order to remove the railroad's interference with the City's easement for street purposes, which easement allegedly includes the "right to prevent any use of the ground beneath or the space above the easement in any manner which directly or indirectly interferes with the full utilization of such easement for street purposes", that the order of the Commission is in conflict with the Constitution of the State of California, Sections 6 and 8 of Article XI, in that the City "receives no legal benefit from the grade separation" since it allegedly has the right to "use its streets unimpeded and unhindered by the existence of the tracks", that the formula adopted by the Commission to allocate costs is prejudicial to the City and has been improperly and incorrectly applied, and that the railroad should be required "to pay the full cost of the proposed improvement which is attributable to the presence of protestant's tracks."

Under date of December 2, 1949, The Atchison, Topeka & Santa Fe Railway Company likewise filed a petition for rehearing alleging that the Commission's conclusion is erroneous and contrary to law in assessing certain costs to the railroad since the City is the sole beneficiary of the proposed structure, that the proposed structure actually will be a detriment to the railroad, that the "benefit" theory should be followed in assessing costs, and that the assessing of costs to the railroad amounts to a taking of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13 of the Constitution of the State of California.

The Commission's order granting a rehearing was issued March 28, 1950, and public hearings were held thereon before Commissioner Huls and Examiner Syphers on De-

ember 27 and 28, 1950, February 2 and 5, and March 19, 1951. On these dates evidence was adduced and on the last-named date the matter was submitted, with the parties being given the right to file briefs. The last of these briefs was filed June 29, 1951. At the request of the parties, the Commission en banc heard oral argument on this matter on November 28, 1951. It is now ready for decision.

At the hearing all parties entered into a stipulation to the effect that all evidence in the prior hearings in this matter, leading to Decision No. 43374, *supra*, be incorporated in this record. This stipulation was accepted.

The crossings which it is proposed to widen and to increase in height are described as follows: Crossing No. 2H-O.1-B is the numerical designation of the crossing of Washington Boulevard and the Harbor Branch line. Its legal description is:

That portion of the right of way, 66 feet wide, of The Atchison, Topeka & Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page 106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

Crossing No. 2-143.2-B is the numerical designation of the crossing of Washington Boulevard and the main line of applicant. Its legal description is:

That portion of the right of way, 100 feet wide, of The Atchison, Topeka & Santa Fe Railway Company (formerly of the California Central Railway Company), described in Judgment of Condemnation had in Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

The record discloses that Washington Boulevard is a public street extending from the westerly boundary of the

City of Los Angeles at the Pacific Ocean in the Venice area, and easterly through the entire breadth of the City and then for a distance of several miles east of the easterly boundary of the City. The grade separations are in the city in an area which constitutes one of the principal industrial districts. Washington Boulevard throughout most of its length has a paved surface of at least 60 feet in width, with a few exceptions where the pavement width varies from 40 to 60 feet. At the site of the existing grade separations, here under consideration, the roadway narrows down to 20 feet in width, and the vertical clearance is between 13 feet and 14 feet. The City's easement at this point is 90 feet.

The evidence in this case discloses that the rail lines in the area of Washington Boulevard were first turned over to the railroad's operating department on September 23, 1887, for the harbor line, and November 24, 1888, for the main line (Exhibit No. 64 R.H.).

The present grade separations were constructed in 1914 in accordance with an agreement between the City of Los Angeles and The Atchison, Topeka & Santa Fe Railway Company. The costs of the structures were borne one-half by the City and one-half by the railway. In 1926 an additional superstructure for another track was installed, and the cost of this addition was paid for in its entirety by the railway.

The applicant City of Los Angeles, during the course of the original hearings, presented three proposals: (1) to fill in the present separation and have the crossings at grade (2) to use the present grade separations for eastbound traffic and to build a new westbound roadway at grade and (3) to widen and increase the height of the existing underpasses. This third proposal is the one which is preferred by applicant. At the second hearing an engineer for the Bridge Division of the City of Los Angeles testified that this proposal, as shown on Exhibit No. 13 of the original hearing,²¹ is still included in the City's plans.

²¹ The exhibits introduced at the original hearing were numbered from 1 to 20, inclusive, those at the rehearing from 21 R.H. to 63 R.H.

The original estimated cost of this proposal was as follows:

Two span-deck girder railway bridges,

One west of Harriet Street	\$192,000	
One east of Harriett Street	204,000	\$396,000

Structure wing walls and walls between

structures		79,800
Storm drain, sewer		240,550
Slope rights		5,750

Total		\$722,100
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However, at the rehearing, the prior estimates of cost (Exhibits No. 14 and No. 15) were revised upwards as set out in Exhibits No. 21 R.H. and No. 22 R.H. The preferred proposal contemplates two bridges with deck girders of rolled, wide flange beam construction on two spans, providing two 43.5-foot openings with a median pier. Each opening would have a 33-foot roadway for three lanes of traffic and a 7-foot pedestrian walk.²²

There was also advanced another proposal to have two 70-foot clear span, through-girder type of bridges, having a single roadway of 56 feet between curbs and two 7-foot walks for pedestrians.

The revised estimates of costs of these proposed structures follow:

Two clear span bridges:

Bridge aA-1	\$252,700	
Bridge aA-144	258,600	\$511,300

Retaining and wing walls		57,845
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		\$569,145
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²² The details of this proposal are set out in Exhibits 9, 10, 11 and 13.

Two divided span bridges:

Bridge aA-1	\$234,000	
Bridge aA-144	246,200	\$480,200
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Retaining and wing walls		89,155
		<hr/>
		\$569,355

In addition to the foregoing costs, there will be additional costs for a storm drain sewer and also for slope rights.

In Decision No. 43374 we pointed out that the roadway on the Washington Boulevard bridge crossing the Los Angeles River is only 56 feet in width. Because there are no intervening streets between this bridge and the underpasses here in question and because of the short distance between the underpasses and the bridge, the width of the bridge roadway was held to be a limitation to the carrying capacity of the street.

The engineer for the Bridge Division of the City of Los Angeles presented testimony to the effect that it is entirely practical to widen this bridge. Exhibit No. 23 R. H. shows three possible ways of doing this and Exhibit No. 24 R. H. shows the estimates as to costs thereof. The plan preferred by the witness would provide a 66-foot roadway with two 5-foot 10-inch sidewalks and would cost \$122,081. One of the other plans would provide a 60-foot roadway and two 5-foot 10-inch sidewalks at a cost of \$100,959, while the remaining plan would provide a 60-foot roadway and one 5-foot 10-inch sidewalk at a cost of \$17,580.

While the City of Los Angeles has no immediate plans for widening this bridge, it was the opinion of the witness that this should be done if the underpasses are widened as proposed.

The engineer of Street and Parkway Design for the City of Los Angeles testified that, in his opinion, the proposed underpass should make full use of the present 90-foot right of way and that to construct an underpass of 56 feet now would not be wise since it would be too difficult to widen in the future. Also, it was pointed out that the advisable procedure would be to widen the underpass first and then

widen the Los Angeles River bridge, the contention being made that the traffic needs justify such construction.

If the two divided span bridges are constructed, as recommended by the City, there would be two 33-foot roadways, permitting three 11-foot lanes in each direction. In addition, sidewalk facilities should be provided and the recommendation was that they be seven feet wide, one for each roadway.

Exhibit No. 25 shows the estimated total cost of this construction to be as follows:

Bridges	\$480,200	
Walls	89,155	
Slopes	5,750	\$575,105
Storm drain		158,660
Street work		72,810
Sewer work	10,350	
Traffic safety devices	1,840	12,190
		<hr/>
		\$812,765

Of the above amounts it was estimated that all of the cost of the bridges, walls and slopes, amounting to \$575,105, and slightly more than one-third of the cost of the storm drain and street work, amounting to \$125,910, or a total of \$701,015, were costs necessitated by the presence of the railway. In other words, the cost to the City, if the railroad were not present, would be as follows:

Storm drain	\$50,900	
Street work	48,660	
Sewer	10,350	
Traffic safety devices	1,840	\$111,750

If this construction is carried out, the costs will have to be met without any help from state funds, according to this record.

Further testimony indicated that the bridge over the Los Angeles River was built in 1931 and it was then that Washington Boulevard became a through street. Prior to that time the existing underpasses were adequate, since they were used only by garbage trucks.

The principal traffic engineer of the City of Los Angeles referred to the prior record, Decision No. 43374, supra, and indicated that the present volume of traffic in the vicinity of the underpass exceeds by five per cent the volume as shown by said prior record. Likewise he reiterated that traffic which normally would use Washington Boulevard is now being diverted to other streets. Exhibit No. 26 R. H. shows the traffic volume in the area, as of Wednesday, December 1, 1948, and also as of Wednesday, December 13, 1950. This exhibit corroborates the above testimony. Exhibit No. 27 R. H., a speed and delay study of this area, also indicates the present underpass to be a bottleneck to traffic.

Exhibit No. 28 R. H. is a record of the accidents which occurred in the area and were reported to the Police Department during the period from February 2, 1948 to February 2, 1951. In this connection the general claim agent for the Santa Fe presented testimony that the railroad has had no costs for property damage or personal injury claims at this underpass. There has been but one claim, wherein an automobile hit the bridge but there was no liability on the part of the railroad.

A consulting engineer, testifying on behalf of the railroad, presented testimony and exhibits in relation to the problem. It was his opinion that widening the underpasses would increase the railroad's costs but would not increase its business. Further, any need for widening or increasing the height of the underpasses is occasioned by highway traffic and not by railroad operations. In the opinion of this witness, the financial soundness of a railroad could be undermined by placing on it too great a share of the cost of grade separations. In this instance, he pointed out, the widening of the underpasses would provide no benefit to the railroad, but actually would be a detriment because of the added expense to the railroad of maintaining a larger structure.

Exhibit No. 29 R. H. is a study compiled by this witness in support of the opinions hereinabove indicated, containing a rather detailed study of the relationship of highways to railroads and the resultant problems of their crossings both at separations and at grade. Among other items, this ex-

hibit contains data showing the grade separations constructed in California during 1948 and 1949, the cost, and the railroads' contributions, if any. Out of the thirty cases listed, five were financed under the Federal Aid Secondary Program and twenty-five were financed out of State funds. Twenty-seven were cases in which the railroad made no contribution, while in the remaining three, one Federal Aid and two State fund projects, the railroads' contribution ranged from 0.5 per cent to 15.4 per cent. All of these thirty constructions were new grade separations and not, as herein proposed, widening of existing overpasses. It was the opinion of this witness that a railroad derived more benefit from a new separation, where the disadvantages of a grade crossing are removed, than from the enlarging of existing structures where the railroad already has the advantage of an existing separation.

In Exhibit No. 31 R. H., this witness amplified this testimony by listing all of the grade separations constructed in California since 1920, showing the percentage of cost allocated to the railroad in each instance, and in Exhibit No. 30 R. H. he set out the total revenues of the various types of carriers in California. The revenues of highway carriers varied from 65.9 per cent of the total for all carriers in 1938, to 73.7 per cent in 1949, the low during this period occurring in 1940 at 65.3 per cent and the high in 1946 at 74.1 per cent.

This witness likewise presented a suggested plan for allocating costs of construction at grade crossings, which plan is set out in Exhibit No. 32 R. H. Further testimony of this witness related to population and motor vehicle registrations (Exhibit No. 33 R. H.), the highways in the area (Exhibit No. 34 R. H.), the general background of rail and highway development, and also some material on the present needs of the highway traffic in the area concerned.

Other witnesses for the railroad reiterated the contention that the widening of these underpasses would provide no benefit to the railroad. The annual reports of the Santa Fe to this Commission were placed in this record by stipulation. While they indicate the railroad to be receiving a rate of return of five per cent net in 1949, yet the witnesses strongly contended that to assess any part of the cost of

this grade separation to the railroad would place a financial burden on it without any benefit to the railroad being derived therefrom.

A representative of the Order of Railway Conductors testified that in the opinion of the group he represented the cost to the railroad should be limited to ten per cent.

The executive director of the League of California Cities filed a resolution, Exhibit No. 53 R. H., which resolution approved a formula of allocating costs whereby the municipality would stand that portion of the total costs of building the improvements if there were no railroad tracks involved and that the railroad would bear that portion of the cost occasioned by the presence of the railroad tracks.

Additional testimony produced by the railroad related to the average annual rate of return from 1930 to 1949 for all class one railroads in the United States and, individually, for The Atchison, Topeka & Santa Fe, Southern Pacific and Union Pacific railroads (Exhibit No. 35 R. H.). The same witness also testified, upon cross-examination, that the Santa Fe stock now sells for about \$169 whereas ten years ago it was below \$100.

The income of the railroad, as shown by its Federal income tax returns for the years 1930 to 1949, was received in evidence as Exhibit No. 53 R. H.

It was also pointed out that recently this company has started a motor carrier operation in California known as the Santa Fe Transportation Company.

Exhibits 37 and 38 R.H. show the accident record and claim costs for a five-year period at certain crossings of the Santa Fe Railroad with various highways. The railroad contended that the most hazardous crossings are in rural areas where there is high-speed auto travel and also high-speed train travel and that there are less accidents at city crossings.

A three-day traffic count of motor vehicles using Washington Boulevard was made in the vicinity of the underpasses here concerned during the days of November 27 and 29 and December 1, 1950 (Exhibits Nos. 39, 40, and 41 R.H.). It was stated by the railroad witness that the only congestion during this traffic count was on eastbound traffic which was blocked at Soto Street.

The bridge engineer for the railroad presented estimates as to the costs of various types of bridges which could be constructed to replace the existing structures (Exhibit No. 42 R.H.). He also called attention to the fact that the Union Pacific Railroad has a bridge across Washington Street east of Soto Street. This bridge provides for four lanes of traffic and could not be widened without great expense. Photographs of this bridge were presented as Exhibits Nos. 43 to 46 R.H. and an elevation drawing of this bridge was submitted as Exhibit No. 47 R.H. This same witness likewise presented the "as built" plans for the existing underpasses here in question, Exhibits 48 and 49 R.H. Other railroad witnesses testified that a four-lane bridge at the existing underpasses might sufficiently meet the needs of traffic.

The manager of the Metropolitan Traffic and Transit Department of the Los Angeles Chamber of Commerce stated he believed the traffic in the area to be sufficient to justify construction of a six-lane underpass.

Various documents of title were introduced into the record both by the Santa Fe and the City of Los Angeles. Exhibits Nos. 50 to 52 R.H. show the Santa Fe's deeds relating to the right of way for the rail tracks in the area, and Exhibits Nos. 54 to 58 R.H. are additional documents introduced by the City relative to the right of way.

Exhibit No. 59 R.H. is composed of copies of franchises from the City of Los Angeles issued to the Santa Fe Railroad covering various crossings and, in particular, one of the underpasses here under consideration.

An engineer of the City of Los Angeles presented testimony pertaining to several grade separations which have been built in recent years in the Los Angeles area. Exhibit No. 60 R.H. shows details of some of these underpasses. Exhibit No. 61 R.H. shows the "live loading" standards of railroad bridges as set out under the specifications of the American Railway Engineers' Association, as well as the recommendations made by that body. According to the witness, the present structures here under consideration were not in accordance with the recommended standards.

The City of Los Angeles further presented a land use map of Washington Boulevard between Alameda Street and Soto Street (Exhibit No. 62 R.H.) tending to show that Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties.

After a careful consideration of all of the evidence adduced herein, and in the light of the evidence adduced in the original hearings, having the benefit of the briefs and oral arguments which have been presented, we conclude to affirm our prior findings to the effect that there is a need for widening and increasing the height of the existing underpasses.

We also find that the preferred plan of the City of Los Angeles, as set out in Exhibit No. 13, heretofore described, sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter.

Our question herein, therefore, is primarily one of cost. If the proposed underpasses are constructed, who shall bear the expense? The positions of the parties have not changed since the prior hearings. Throughout these proceedings the City of Los Angeles has contended that the railroad should pay that portion of the total cost which is attributable to the presence of the railroad tracks. Under this contention it is the City's position that it should pay only that cost of widening the street which it would pay if there were no railroad crossing, and all other costs, including the cost of the bridge and its supports, should be borne by the railroad.

It has been the position of the railroad throughout these proceedings that the costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed structures since it now is operating in a satisfactory manner over the present structures, and the widening of the street will in no way change these operations. As a matter of fact, it is the railroad's position that the construction of new structures will actually be a detriment, since there will be increased costs in their maintenance. The railroad further contends

that the need for new structures has not arisen because of any railroad operations, but rather because of the increased motor vehicle and pedestrian traffic in the vicinity.

In the light of the particular facts in this record, we do not subscribe to either contention. Previously, in Decision No. 43374, we held that, due to the width of the existing bridge over the Los Angeles River, and giving consideration to the length of the proposed structure, as well as to the length of the existing structure, 40 per cent of the cost attributable to the presence of the railroad tracks should be allocated one-half to the railroad and one-half to the City.

In the light of the facts presented at the rehearing, particularly with reference to the possibilities of widening the existing bridge over the Los Angeles River, and also with reference to the costs of the various structures proposed, as hereinbefore set out, we find that the method of allocating costs, as set out in Decision No. 43374, should be discarded.

The authority of this Commission to allocate costs in this matter stems primarily from Section 1202 of the Public Utilities Code, from which we quote in part:

"The Commission has the exclusive power:

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under

the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161).

The railroad here contends that the modern development of the law in regard to apportionment of costs in grade separation cases has been toward the allocating of such costs according to the benefits received by the parties involved. In 1932, we are reminded, these same parties were before this Commission in a similar proceeding involving a proposed widening of the same two crossings. (Decision No. 25069, dated August 15, 1942, in Application No. 18063, 37 C.R.C. 784). The Commission's order authorized the widening, and held that the costs should be borne "25 per cent by The Atchison, Topeka & Santa Fe Railway Company and 75 per cent by applicant." The Commission then said, "In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party,

as well as to the benefits derived." However, this record discloses that material changes have taken place in conditions at the present time as compared to those in 1932. As we said in Decision 43774, *supra*, "The great increase in population and the tremendous increase in motor vehicle traffic present a new problem."

Likewise, the railroad relies rather strongly on the decision of the United States Supreme Court in *Nashville, Chattanooga and St. Louis Railway v. Walters*, 1934, 294 U. S. 405; 79 L. ed. 949. There an order of the State Commissioner of Highways requiring the railroad to construct and pay one-half the cost of an underpass at the intersection of the tracks and a proposed state highway was held to be arbitrary and unreasonable since the railroad received no benefits from the proposed construction. In that case the highway involved was not designed to meet local transportation needs, but was a state highway intended to be a link in the national transportation system, and the financing thereof was to come largely through Federal aid.

In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds.

In Decision No. 43374, *supra*, we said "the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated." While we hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad. Because of the grade separation it can operate longer trains without experiencing delays at this location and without the hazard of grade crossing accidents. The proposed structure would result in a new bridge to replace one that is 75 per cent depreciated, and the new bridge would conform to the recommended "live loading" standards or cooper ratings, whereas the present structures do not.

As previously pointed out herein, the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided

span bridges is \$569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of \$569,355 is the amount of costs which should be allocated in this proceeding.

After a full consideration of all of the evidence, briefs and oral argument presented in this matter, we hereby find it to be in the public interest to authorize the widening and increasing of the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in accordance with the preferred plan of the City of Los Angeles as previously described herein. We further find that The Atchison, Topeka & Santa Fe Railway Company shall bear fifty per cent (50%) of the said amount of \$569,355, the costs to be allocated, hereinabove indicated, and the City of Los Angeles the remainder.

ORDER ON REHEARING

Application as above entitled having been filed, a hearing and rehearing having been held thereon, and the Commission being fully advised in the premises,

It is ordered that the City of Los Angeles be, and it hereby is, authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company in the manner and at the locations more particularly described in the foregoing opinion, and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. Fifty per cent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street, shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the costs shall be borne by the City of Los Angeles.

2. In the event applicant elects to construct said undergrade crossings, the cost of maintaining those portions of the separations which, for the purpose of this

decision, shall be referred to as the superstructures, which shall be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka & Santa Fe Railway Company. The remainder of the maintenance of said structures shall be borne by applicant.

3. Prior to the commencement of construction, applicant shall file with this Commission for approval a set of plans for the proposed alterations of the grade separation crossings, which plans shall have been approved by The Atchison, Topeka & Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve such plans. In the event the said railway company refuses to approve such plans, this Commission may issue supplementary orders in this matter.

4. The crossing shall be constructed with clearances conforming to the provisions of General Order 26D of this Commission.

5. Within thirty (30) days thereafter, applicant shall notify this Commission, in writing, of the completion of the installation of said crossings and of its compliance with the conditions hereof.

6. The authorization herein granted shall lapse if not exercised within one (1) year after the date hereof unless further time is granted by subsequent order.

The effective date of this order shall be sixty (60) days after the date hereof.

Dated at San Francisco, California, this 24th day of June, 1952.

R. E. MITTELSTAEDT,
President.

JUSTUS F. CRAEMER,
HAROLD P. HULA,
KENNETH POTTER,
PETER E. MITCHELL,
Commissioners.